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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

No. 75-1241

MID-AMERICA TRANSPORTATION COMPANY, INC.,
Petitioner,

vs.

NATIONAL MARINE SERVICE, INC.,

and

M V NATIONAL PROGRESS, HER ENGINES, BOILERS, ETC.,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS, EIGHTH CIRCUIT

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This case presents no appropriate issue for exercise of this Court's discretion to grant the Petition for Certiorari as the opinion of the Court of Appeals is not in conflict with opinions rendered by this Court or other circuits. Instead, this case involves nothing more than application of the "clearly erroneous" rule in a judge-tried case 2

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OPINION BELOW

Besides the opinion of the Court of Appeals set forth in the appendix to the Petition for Writ of Certiorari, previous opinions in this case include *Mid-America Transportation Company, Inc. v. National Marine Service, Inc., et al.*, 356 F.Supp. 1358, and *Mid-America Transportation Company, Inc. v. National Marine Service, Inc., et al.*, 497 F.2d 776, and the opinion of the District Court set forth in appendix A to this Response.

ARGUMENT

This case presents no appropriate issue for exercise of this Court's discretion to grant the Petition for Certiorari as the opinion of the Court of Appeals is not in conflict with opinions rendered by this Court or other circuits. Instead, this case involves nothing more than application of the "clearly erroneous" rule in a judge-tried case.

As the Petitioner correctly points out in his Statement of Facts, this is the second time the United States Court of Appeals for the Eighth Circuit has considered this case. The case was initially tried and appealed and remanded for a partial retrial. The decision on the retrial was then appealed. It is this second opinion rendered in this case by the United States Court of Appeals for the Eighth Circuit which Petitioner seeks to challenge by its Petition for Writ of Certiorari. Consequently, in order to understand the issues presented for review in this case, it is necessary to read the various opinions rendered in the case prior to this most recently challenged opinion. They include: the opinion rendered by the District Court in the initial trial of the case, *Mid-America Transportation Company, Inc. v. National Marine Service, Inc., et al.*, 356 F.Supp. 1358; the Court of Appeals opinion in the appeal from that initial decision, *Mid-America Transportation Company, Inc. v. National Marine Service, Inc., et al.*, 497 F.2d 776, and the decision rendered by the District Court in the retrial of the action, *Mid-America Transportation Company, Inc. v. National Marine Service, Inc., et al.*, appendix A to this Response.

Focusing on the two opinions rendered by the Court of Appeals for the Eighth Circuit in this case, it is clear that the opinion challenged is not inconsistent with this Court's decision in *The Steamer Webb*, 81 U.S. (14 Wall.) 406, 20 L.Ed. 774 (1871). Nor, as Petitioner contends, is it contrary to the Fifth

Circuit's decision in *Bisso v. Waterways Transportation Company*, 235 F.2d 741 (5th Cir. 1956). A full reading of the initial decision discloses that the Court of Appeals for the Eighth Circuit in fact specifically followed those decisions (497 F.2d at 779-80) in concluding that the Respondent here had the duty of producing evidence "to establish that she was in the channel and did not *hit* a known obstruction therein . . ." (loc. cit. 780).

A reading of the lower Court's decision (appendix A hereto) shows that in fact Respondents did go forward with the evidence in an attempt to rebut an inference of negligence. The District Court concluded that the evidence introduced did cast doubt upon the inference and the Petitioner put on no evidence to challenge the evidence of the Respondents. The Court of Appeals held that the District Court was not "clearly erroneous" in arriving at that conclusion. The case has been tried twice, has been exhaustively briefed on two occasions and argued on two occasions, the Court of Appeals has given due consideration to the issues raised and has defined accurately the legal questions involved. This attempt to obtain review by the United States Supreme Court raises no substantial legal questions and no colorable issues of conflict between the decisions of the Eighth Circuit Court of Appeals and the United States Supreme Court or some other circuit court but instead, in substance, continues to attack the ruling of the District Court as being "clearly erroneous". It is submitted that this is an inappropriate issue for grant of Certiorari.

CONCLUSION

For the reasons set forth above Respondents respectfully submit that the Petition for a Writ of Certiorari should be denied.

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APPENDIX

OPINION OF U.S. DISTRICT COURT

In the United States District Court for the
Eastern District of Missouri
Eastern Division

Mid-America Transportation Company, Inc., Plaintiff, vs. National Marine Service, Inc., and M/V National Progress, Her Engines, Boilers, etc., Defendant.	No. 71 A 692 (3).

ORDER

(Filed in U.S. District Court March 5, 1975)

In accordance with the Memorandum of this Court filed this date and incorporated herein,

It Is Hereby Ordered that defendant, National Marine Service, Inc., and M/V National Progress, her engines, boilers, etc., have judgment against the plaintiff, Mid-America Transportation Company, Inc.; and

It Is Further Ordered that plaintiff, Mid-America Transportation Company, Inc., pay costs.

Dated this 5th day of March, 1975.

/s/ H. KENNETH WANGELIN
United States District Judge

JUDGMENT OF U.S. DISTRICT COURT

MEMORANDUM

(Filed in U.S. District Court March 5, 1975)

This matter is before the Court for an additional hearing as mandated by the United States Court of Appeals for the Eighth Circuit. 497 F.2d 776 (8th Cir., 1974).

This action was brought pursuant to the admiralty and maritime jurisdiction of this Court to recover damage to a barge and its cargo sustained while in tow of the defendant's tug. This Court entered judgment for the defendants. 356 F.Supp. 1358 (E.D. Mo., 1973). On appeal, the Eighth Circuit Court of Appeals Ordered that there should be further proceedings at which the tug (the defendant) should be given an opportunity (subject to rebuttal by the barge (the plaintiff)) to carry the burden of discharging the inference of liability. The Court being fully apprised of the premises hereby makes the following findings of fact and conclusions of law.

Findings of Fact

1. The defendants produced sufficient evidence to establish that the M/V National Progress and its tow were in channel and did not hit a known obstruction while within the channel.

2. The defendants have come forward with evidence sufficient to cast doubt upon the validity of an inference of the tug's negligence. No evidence was introduced by plaintiff that was sufficient to rebut the defendants' proof that the M/V National Progress and its tow were within the channel and did not hit a known obstruction in the channel.

3. The barge, MAT-75 (plaintiff) has not sustained the burden of ultimate persuasion resting upon it from the start of this action and, therefore, cannot prevail.

Conclusions of Law

The facts and evidence adduced at the hearing which this Court held lead to one inescapable conclusion, namely, that the defendant has rebutted the prima facie case against it and that the plaintiff has failed to carry the burden of ultimate persuasion resting upon it. *Bisso v. Waterways Transportation Co.*, 235 F.2d 741 (5th Cir., 1956). The evidence conclusively shows that the M/V National Progress and its tow were in the channel at all times and did not hit a known obstruction within the channel. According to the Mandate of the Eighth Circuit Court of Appeals, cited above, there can be no other finding other than that for the defendant.

Dated this 5th day of March, 1975.

/s/ H. KENNETH WANGELIN
United States District Judge